

SOAH DOCKET NO. 582-12-5353
TCEQ DOCKET NO. 2011-1647-PWS-E

EXECUTIVE DIRECTOR OF THE	§	BEFORE THE
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	
Petitioner	§	
	§	
V.	§	STATE OFFICE OF
	§	
SOUTH TEXAS WATER AUTHORITY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR'S REPLY TO
SOUTH TEXAS WATER AUTHORITY'S EXCEPTIONS**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE CRAIG BENNETT (ALJ):

The Executive Director (ED), respectfully files this reply to South Texas Water Authority's (STWA's) exception to the PFD. In STWA's exception, STWA claims that according to the plain language of the definition of public water system (PWS), it does not fall within that definition. However, according to the plain language of the definition of PWS, the Safe Drinking Water Act (SDWA) and TEXAS HEALTH & SAFETY CODE (THSC) ch. 341, these regulations encompass the whole process of producing and distributing drinking water, not just retail distribution.

If STWA were not a PWS, then STWA's six customers would be in jeopardy of violating drinking water regulations. The THSC does not allow PWSs to be physically connected to non-PWSs; since each of STWA's customers shares an interconnection with STWA, the customers would be in violation of the THSC if STWA were not a PWS. Additionally, the state and federal drinking water regulations contain specific requirements for both treatment and infrastructure from the point of primary treatment to customer service lines. If STWA were not a PWS, then its customers would not be in compliance with these requirements for primary treatment and distribution. There is no testing and treatment technique specified in the regulations for PWSs who obtain water from an unregulated third party or share an interconnection with a non-PWS, so it is unclear what, if anything, the customers could do to comply with the regulations and still be able to utilize STWA's water.

Moreover, STWA's apparent proposal that retail providers should be allowed to obtain water from an unregulated entity and merely apply minimal secondary treatment is not supported by the regulations, and is not supported by scientific principles as required to ensure safety.

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I. According to the plain language of the definition of PWS, STWA is a PWS because the definition encompasses the whole process of producing and distributing drinking water, not just retail distribution.

In STWA's exception, STWA asks that the definition of PWS be evaluated according to its plain language. The ED agrees that the language of the rules is certainly an important consideration. STWA asserts that the ED and EPA's longstanding interpretation of the definition of PWS is contrary to the plain meaning of the words in the definition. The ED disagrees. The ED's interpretation of the definition is consistent with its plain meaning which encompasses the whole process of producing and distributing drinking water, not just retail distribution.

The definition of PWS is:

Public water system--A system for the provision to the public of water for human consumption through pipes or other constructed conveyances, which includes all uses described under the definition for drinking water. Such a system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year. This term includes; any collection, treatment, storage, and distribution facilities under the control of the operator of such system and used primarily in connection with such system, and any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system. Two or more systems with each having a potential to serve less than 15 connections or less than 25 individuals but owned by the same person, firm, or corporation and located on adjacent land will be considered a public water system when the total potential service connections in the combined systems are 15 or greater or if the total number of individuals served by the combined systems total 25 or greater at least 60 days out of the year. Without excluding other meanings of the terms "individual" or "served," an individual shall be deemed to be served by a water system if he lives in, uses as his place of employment, or works in a place to which drinking water is supplied from the system.¹

According to the plain language of the definition, a PWS is a system of pipes used to convey water for human consumption by the public. It includes "any" collection, treatment, storage, and distribution facilities. This language is inconsistent with encompassing only retail distribution. The system starting from the collection of water and treatment at the Corpus Christi treatment plant and the connected pipes from the treatment plant to the consumer service lines meet this definition. A principal issue of debate is whether this is a "public" water

¹ 30 TEX. ADMIN. CODE § 290.38(66).

system. Without consideration as to the number of connections², according to the definition, if at least 25 individuals are served by the system, then it is public. The system from the Corpus Christi plant to the customer service lines serves thousands of people. Consequently, it does serve the public. The definition goes on to limit responsibility to only those portions of the system within an operator's control, and establish that the operator's PWS, for the purpose of regulation, is only those portions within its control.

The definition does not mention ownership or contracts. It does not contain limits confining the term to only those parts of the system with "direct" access to the individuals who consume the water. Logically, ownership regarding portions of the pipes does not impact whether or not the system serves the public and does not impact what the requirements should be to treat drinking water and maintain the integrity of drinking water until it is out of the public domain, reaches private hands and is ultimately consumed. In order to maintain the integrity of the water such that it is fit for human consumption, the entire length of the pipeline does matter. If one portion of the pipeline does not comply with the drinking water safeguards contained in the regulations, the integrity of the water is compromised. To maintain the safety of the water so that it is fit for human consumption, during distribution, the infrastructure needs to be sanitary and secure, and the maximum contaminant level of microorganisms must remain in check. The pipes cannot be made of lead and must be sanitary when placed within the infrastructure of the PWS. The water must remain in a secure environment so that additional contaminants are not allowed to enter the water. Necessary secondary treatment must be maintained to keep microorganism growth in check.

If the definition were only intended to apply to retail providers, then the definition would be tailored to retail providers. The definition includes "any" collection, treatment or distribution. If a treatment plant need not be regulated (such as in the case of no retail customers) why burden treatment plants with retail customers with this additional regulation. If the definition were only to apply to retail providers, then there would be regulations to address requirements for retail water providers who obtain water from unregulated entities. Such regulations do not exist. The regulations address how to test and treat surface water and ground water. The regulations require a contained safe environment for the water from primary

² The witnesses in this case focused on the number of individuals served as opposed to connections. As PWSs become more complicated by having interconnections between other PWSs, such as wholesale providers, determining the number of connections appropriate to the population becomes more complicated. For example, if you include all interconnections and retail connections, the number of counted connections might be higher than representative of the population served. Thus, as the witnesses explained, it is simpler to focus on the number of individuals served if that number is more readily available, as it is in this case.

treatment to consumer service lines. This is consistent with the ED's interpretation and inconsistent with STWA's.

STWA sells water intended for human consumption by thousands of people; since there is human consumption, necessarily there must be individual humans doing the consuming. To accurately determine the individuals served by STWA, a count of the individuals actually consuming the water STWA sells is required.

STWA's argument relies on the position that the definition of the word "serve" is limited to a narrow construction requiring water to be directly provided to individuals by STWA via a direct contractual relationship. The definition of the word serve is not as narrow as STWA claims. According to Merriam-Webster³, there are 20 distinct definitions of the word "serve":

- 1 - a: to be a servant
b: to do military or naval service
- 2 - : to assist a celebrant as server at mass
- 3 - a: *to be of use <in a day when few people could write, seals served as signatures — Elizabeth W. King>*
b: to be favorable, opportune, or convenient
c: to be worthy of reliance or trust <if memory *serves*>
d: to hold an office : discharge a duty or function <*serve* on a jury>
- 4 - : to prove adequate or satisfactory: SUFFICE <it will *serve* for this task>
- 5 : to help persons to food: as
a: to wait at table
b: to set out portions of food or drink
- 6 - : to wait on customers
- 7 - : to put the ball or shuttlecock in play in various games (as tennis, volleyball, or badminton)
- 8 - a: to be a servant to : ATTEND
b: to give the service and respect due to (a superior)
c: to comply with the commands or demands of : GRATIFY
d: to give military or naval service to
e: to perform the duties of (an office or post)
- 9 - : to act as server at (mass)
- 10 - *archaic*: to pay a lover's or suitor's court to (a lady) <that gentle lady, whom I love and *serve*— Edmund Spenser>
- 11 - a: to work through (a term of service)
b: to put in (a term of imprisonment)
- 12 - a: to wait on at table
b: to bring (food) to a diner
c: PRESENT, PROVIDE —usually used with *up* <the novel *served up* many laughs>
- 13 - a: to furnish or supply with something needed or desired
b: to wait on (a customer) in a store
c: to furnish professional service to
- 14 - a: to answer the needs of

³m-w.com

- b*: to be enough for : SUFFICE
c: to contribute or conduce to : PROMOTE
15 - : to treat or act toward in a specified way <he *served* me ill>
16 - *a*: to bring to notice, deliver, or execute as required by law
b: to make legal service upon (a person named in a process)
17 - *of a male animal*: to copulate with
18 - : to wind yarn or wire tightly around (a rope or stay) for protection
19 - : to provide services that benefit or help
20 - : to put (the ball or shuttlecock) in play (as in tennis or badminton)

Many of the definitions are not limited to the situation in which service only occurs if there is direct interaction with those served. The entire process of producing and distributing drinking water serves the ultimate individuals that consume the water. This is done by treating raw water to make it fit for human consumption, and then maintaining the integrity of the drinking water until it is provided to the individual consumers. If any portion of the process is compromised, the individuals are ill-served.

II. The ED's interpretation is consistent with the intent of the THSC and the SDWA that the whole process of producing and distributing water be subject to regulation; STWA's interpretation is not consistent with the THSC or the SDWA.

Not only is the ED's interpretation of the definition of PWS consistent with the plain meaning of its terms, the ED's interpretation is also consistent with the clear intent of the SDWA and THSC that the definition encompass the whole process of producing and distributing drinking water, not just retail distribution.

As a contextual framework, administrative rules are ordinarily construed like statutes.⁴ The goal is to give effect to the drafters' intent, derived from the rule's language, history, and purpose, and from the consequences of alternate constructions.⁵ It is presumed that the drafters intended their handiwork to be effective and to yield just and reasonable results.⁶ When looking at the language as well as these other considerations, all of the relevant factors support the ED's construction.

Dr. Deihl, Mr. Weddell and Mr. Atkins discussed the purpose and the history of the regulations. The intent is to provide uncontaminated water to the public. This is done by treating the water and then keeping it sanitary (much like food) until it is consumed by the public. This intent is defeated if the rules are construed to not require sanitary equipment and

⁴*Combined Specialty Ins. Co. v. Deese*, 266 S.W.3d 653, 660 (Tex. App.—Dallas, 2008).

⁵*Id.*; *Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000).

⁶*Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001).

treatment during part of the pipeline that distributes the water, or to only require sanitary equipment and treatment at the last portion of the pipe that connects to the customer service lines. STWA's interpretation is illogical.

Moreover, an administrative agency's reasonable interpretation of its own regulations is entitled to deference by the courts.⁷ The review is limited to determining whether the administrative interpretation is plainly erroneous or inconsistent with the regulation.⁸ An interpretation is not plainly erroneous if it is a reasonable interpretation.⁹ The TCEQ and EPA's interpretation is consistent with the language of the definition and is not only reasonable, it is necessary to be in accordance with the intent of the SDWA and THSC.

The state and federal drinking water regulations were promulgated under the SDWA and THSC ch. 341. These regulations contain requirements that pertain to infrastructure, monitoring and treatment from the point raw water is collected for treatment until it is provided to the consumers of the water. These regulations have been in place for decades. Neither the state nor federal legislatures have revised the SDWA or THSC to provide a narrower scope of regulation of drinking water.

In contrast, STWA's interpretation leads to unreasonable results and undermines the intent of the SDWA and THSC. According to STWA's interpretation, the entity that directly serves the individual has to do all treatment requirements under the rules; according to STWA, those without direct contact are not subject to regulation or responsible for treatment. The federal and state regulations do not support this. There are no regulations for retail providers who obtain water from an unregulated source. In contrast, the regulations contain requirements for the entire process, thus prohibiting part of the process to evade regulation.

STWA seems to suggest that its customers would only be required to do secondary treatment, but that is not the case. Yet, there is no provision in the rules about the necessary treatment for a retail provider who obtains water from a third party unregulated entity. This is because, according to its plain language, the regulations require the whole process to have regulatory oversight and safeguards in place. Since there is no oversight of an unregulated entity and the unregulated entity is not subject to the safeguard requirements in the regulations, there are no assurances of a safe, sanitary uncontaminated environment. There are no assurances that the unregulated entity's pipes are made of safe sanitary material. There are no assurances of pipe integrity such that intrusion of contaminants has not occurred. If the

⁷ *Id.* at 660.

⁸ *Id.*

⁹ *Id.* at 660-661.

definition and regulations only intended to apply to retail providers, then there would be regulations suited for retail providers and identifying what water they are authorized to accept, who from, and how to develop treatment. Instead, the regulations encompass one scientifically proven process for the production and distribution of potable water. The reliability of that process is predicated on the entire process being regulated such that all regulatory safeguards are in place. STWA's proposal that retail providers can obtain water from an unregulated source, test the water, determine necessary treatment, and treat is contrary to the intent of the SDWA, the THSC, and the regulatory scheme. It is also not supported by sound scientific principles.

III. Contrary to the claim of STWA, people of common intelligence have considered wholesale providers and treatment plants to be encompassed in the definition of PWS; those people include the TCEQ, EPA, the nation, as well as STWA and its customers.

In STWA's exception, STWA claims that a person of common intelligence would not consider that STWA "serves" the individuals that consume water that went through STWA's pipes during distribution from primary treatment to the ultimate consumers. The ED disagrees. In fact, people of common intelligence currently and historically have considered treatment plants and wholesale providers as serving the individuals who consume the drinking water that they treat and distribute.

STWA cites to *City of Webster v. Signad, Inc.*¹⁰ for its claim that the definition of PWS is unconstitutionally vague because persons of common intelligence would not consider that STWA "serves" the individuals that consume the water STWA distributes. STWA knowingly provides water intended for human consumption. It is not unconstitutionally vague for STWA to be considered to "serve" the individuals that consume STWA's water.

A statute or ordinance is fatally vague when persons regulated by it are exposed to detriment without "fair notice" of the nature of the proscribed conduct.¹¹ No more than a reasonable degree of certainty is required by the regulation, and this requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.¹² Likewise, a statute is not unconstitutionally vague merely because it does not define words or phrases.¹³ Just because

¹⁰ 682 S.W.2d 644 (Tex.App.-Hous. [1st. Dist.] 1984).

¹¹ *Howeth Investments, Inc. v. City of Hedwig Village*, 259 S.W.3d 877, 903-905 (Tex.App.-Houston [1st Dist.] 2008).

¹² *Id.*

¹³ *Id.*

parties disagree as to a regulation's meaning does not mean the regulation is unconstitutionally vague.¹⁴ The existence of the dispute does not render the law unconstitutionally vague.¹⁵

The persons regulated in this case are those entities involved in the production and distribution of drinking water. Those persons are familiar with the fact that there are necessary safeguards to treat raw water and maintain potable water. All entities necessarily contribute to the safety of the water and thus they all serve the individuals who drink the water. It is clear which individuals are at risk if STWA were not subject to regulation; it is the individuals who consume the water. Because STWA is subject to regulation, there are assurances that STWA's infrastructure is not made of lead, is sanitary and leak-proof. Because STWA is subject to regulation, STWA monitors and treats the water as it passes through its infrastructure. These regulations protect those individuals served by STWA's system. STWA is on "fair notice" that it serves the individuals that use its water for human consumption.

The entire national regulated community has historically considered treatment plants and wholesale water suppliers as PWSs. The Texas definition of PWS mirrors the federal definition of PWS. Both contain language requiring the system to have at least 15 connections or "serve" at least twenty-five individuals.¹⁶ It is important to note that because the Texas definition mirrors the federal definition and because Texas has primacy to implement the SDWA in Texas, the TCEQ has limited flexibility to change the Texas definition of PWS. As Dr. Deihl, Mr. Weddell, and Mr. Blake testified, the definition of PWS has historically been interpreted to include treatment plants and wholesale water supplier. Because the same language is used on a national level, the entire national regulated community has historically considered that treatment plants and wholesale providers "serve" the individuals that drink the water they treat and distribute. In fact, until the TCEQ began enforcement proceedings against STWA for failing to maintain the minimum disinfectant residual, STWA and its customers considered STWA a PWS. Moreover, STWA and its customers have continued to act as if STWA is a PWS to this day. STWA still complies with the regulations. In the most recent contracts between STWA and its customers, the contracts require STWA to comply with TCEQ regulations and provide potable water.¹⁷ Customer representatives testified that they cannot perform primary treatment and expect STWA's water to be potable.¹⁸ There is no evidence that STWA or any of its customers have made an application for approval of a connection between a PWS and a non-PWS.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ ED Ex. Z at 0005.

¹⁷ *See, e.g.*, ED Ex. 14 at 0003.

¹⁸ *See, e.g.*, Tr. Vol. 2 at 47; Tr. Vol. 2 at 64; Tr. Vol. 2 at 75; and Tr. Vol. 2 at 80.

STWA may claim that the issue of it not being a PWS arose recently since it no longer provides retail water to a correctional facility. However, Ms. Carola Serrato, Executive Director of STWA, testified that she began considering STWA not to be a PWS in 2008, when the ED began an enforcement proceeding against STWA for failing to maintain the disinfectant residual.¹⁹ Also, STWA filed a motion to dismiss based on the fact that it is not within the definition of PWS at the beginning of this case, when the correctional facility was still one of its customers. STWA's relationship with the correctional facility demonstrates some of the issues in this case. The reason STWA claims it no longer "serves" the correctional facility is because now one of STWA's customers has a contract with the correctional facility, instead of STWA. The only changes were contractual.²⁰ There was no change in infrastructure or the water provided. The same people are served the same water; STWA merely changed its contracts presumably to not be considered a "retail" provider for that facility. If STWA's interpretation of PWS prevails, STWA's contractual arrangement with one customer will place all of its customers suddenly in the position of being in violation of THSC § 341.033(e) because the customers would now be physically connected to a non-PWS. STWA's re-interpretation causes problems; it is not a solution.

IV. The EPA guidance is consistent with the SDWA, THSC and definition of PWS in that the whole process of producing and distributing drinking water must be subject to regulation.

STWA and the ALJ are persuaded by an EPA guidance discussing a revision to the definition of PWS to include suppliers that use constructed conveyances other than pipes.²¹ Prior to the revision, the definition only included suppliers that used pipes to convey water. The purpose of the revision was to include irrigation districts that supply untreated raw water through canals to humans that consume the raw water. This guidance was intended to clarify who would be considered a PWS under the revision. Thus, this guidance was intended for suppliers of untreated or raw surface water.²² The guidance states that it does not count as a "service connection", and presumably as individuals served, where:

a water supplier indirectly provides water for human consumption to a municipality or pass-through entity which actually provides the water to end users and which itself is a [public water system] that must meet [Safe Drinking Water Act] requirements.²³

¹⁹ Tr. Vol. 2 at 225.

²⁰ Tr. Vol. 2 at 54-55.

²¹ STWA Ex. 1 at Tab 10, p. 1 of 2.

²² *Id.*

²³ STWA Ex. 1 at Tab 10, p. 1 of 2.

This scenario is directed to entities that supply raw water through canals. It is specifically a discussion of raw water suppliers that “indirectly” provide water for human consumption. Throughout the guidance, the guidance explains that it is a guidance for suppliers of raw water through an open conveyance. For example, after the statement relied upon by the ALJ and STWA, the guidance expressly clarifies the intended audience as suppliers of raw water in an open conveyance. After the statement about “indirectly” providing water, the guidance states:

Whether it is a “connection” where individuals directly take water for human consumption from a supplier’s open conveyance depends on the facts of each situation,...²⁴

The guidance clarifies that canals do not suddenly become a PWS because water in the canals might be used as source water for downstream PWSs. The guidance clarifies this was not an intended result of the revised definition. The guidance further clarifies that the revision is intended to apply to canals when individuals use the raw water in the canals for human consumption.

This guidance is consistent with the ED’s interpretation. In the guidance, all of the SDWA requirements are being met by the downstream PWSs because treatment has not begun. The downstream PWSs must meet primary treatment requirements, infrastructure requirements and distribution requirements. This is possible since treatment has not begun before the PWS collects the raw water. The downstream PWS can meet the primary treatment requirements and distribution requirements, which apply throughout distribution from the point of primary treatment to the consumer service line. This guidance was not intended to carve out of the definition of PWSs wholesale providers and treatment plants. The revision to the definition of PWS was to expand the scope of regulation, not decrease it. The EPA guidance states it is “[c]onsistent with our broad SDWA implementation strategy”. Moreover, this statement in this guidance does not discount the other manifestations of intent that the regulations encompass the whole process of producing and distributing drinkingwater.

In contrast to the downstream PWSs referenced in the guidance, if STWA were not a PWS, STWA’s customers would not meet all SDWA requirements because the customers would be connected to a non-PWS and unable to meet the distribution requirements that apply throughout distribution from the point of primary treatment to the consumer service lines. Nor can STWA’s customers perform primary treatment. Furthermore, there is no provision in the SDWA regulations allowing a PWS to obtain water from an unregulated entity. The regulations

²⁴ *Id.*

apply from the point of collection of either the surface body of water or the groundwater well. These are just examples of how STWA's customers would not be able to meet the SDWA regulations.

V. Adopting a new interpretation of PWS to take a portion of the drinking water process outside regulation has potentially serious consequences.

The issue of whether STWA is a PWS could have serious consequences both within this case and even nationally.

There are safety issues for the individuals that drink the water that passes through STWA's system. Thus far, STWA has operated as a PWS. It is unclear what the quality of the water would be if STWA is not subject to the safeguards in place designed to ensure the safety of drinking water.

There are consequences to STWA's customers. There is no identifiable path for STWA's customers to be able to comply with regulations if STWA were not a PWS. They would be connected to a non-PWS, in violation of the THSC. The water they would receive from STWA would not be in compliance with the SDWA safeguards required throughout distribution. As STWA's customer representatives testified, they do not perform and are not equipped to perform anything other than secondary, maintenance, treatment.

The issue of safety reaches beyond the facts of this case. If the TCEQ re-interprets the definition of PWS to remove from regulatory oversight a portion of the production and distribution of drinking water, there is no evidence that there are scientifically sound testing and treatment techniques to ensure safe drinking water for the public. This is not an issue just about word-splicing; it is necessary to be certain that there are feasible, cost-effective, scientifically sound methods in place to accommodate a new regulatory approach and still ensure safe drinking water. There is no evidence such methods are in place.

If Texas takes a narrower interpretation of its jurisdiction over drinking water providers than the EPA, there could be consequences to Texas' primacy. Federal regulations require Texas' regulations to be at least as stringent as the federal regulations. The ED's interpretation of PWS is consistent with the EPA's interpretation of the federal definition, which contains virtually the same language. This is also consistent with longstanding application of the definition by both the EPA and TCEQ. If the TCEQ changes course now, it is not clear what the impact will be on Texas' primacy and the state implementation of the SDWA regulations.

Because the federal definition contains the same language, it is unclear what the national implications might be if this language is deemed to be narrower than what it has always been

considered. The ED and EPA's longstanding interpretation is reasonable, consistent with the plain language of the definition and the regulatory scheme, and preserves the proven scientific and technical methodology designed to ensure safe drinking water.

VI. Conclusion

For these reasons, the ED respectfully requests the ALJ reconsider the PFD and recommend the ED's exceptions. The ED further respectfully requests that the Commission adopt the ED's exceptions.

Respectfully submitted,

Texas Commission on Environmental Quality

Zak Covar
Executive Director

Caroline Sweeney, Deputy Director
Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division

by  

Jennifer Cook
State Bar of Texas No. 00789233
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-3400
(512) 239-3434 (FAX)
jennifer.cook@tceq.texas.gov

CERTIFICATE OF SERVICE



I hereby certify that on August 22, 2013, the foregoing document was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day the foregoing document was served as indicated:

The Honorable Administrative Law Judge Craig Bennett
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649
512-322-2061
Via Electronic Filing

Mike Willatt
Respondent's Attorney
Willatt & Flickinger
2001 North Lamar
Austin, Texas 78705
Via Electronic Mail to mwillatt@wfaustin.com

Scott Humphrey
Office of Public Interest Counsel, MC 103
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
Via Electronic Mail to scott.humphrey@tceq.texas.gov

Jennifer Cook